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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Promotion of Competitive Networks in Local
Telecommunications Markets

Wireless Communications Association
International, Inc. Petition For Rulemaking to
amend Section 1.4000 of the Commission's
Rules to Preempt Restrictions on Subscriber
Premises Reception of Termination Antennas
Designed to Provide Fixed Wireless Services

Implementation of the Local Competition
provisions of the Telecommunications Act of
1996

Review of Sections 68.104, and 68.213 of the
Commission's Rules Concerning connection of
Simple Inside Wiring to the Telephone
Network

WT Docket No. 99-217

CC Docket No. 96-98

CC Docket No. 88-57

To: The Commission

REPLY COMMENTS OF ADELPHIA BUSINESS SOLUTIONS, INC.

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ABS SUPPORTS A COMMISSION RULE BANNING ILECS FROM SERVING MTES THAT DO NOT PERMIT NONDISCRIMINATORY ACCESS TO ALL LECS	3
III. EASEMENT LAW PROHIBITS THE UNDERLYING PROPERTY OWNER FROM RESTRICTING APPORTIONMENT OF UTILITY EASEMENTS	6
IV. PREFERENTIAL MARKETING AGREEMENTS SHOULD BE PROHIBITED, THE COMMISSION'S RULES SHOULD APPLY TO EXISTING AGREEMENTS, AND ENFORCEMENT SHOULD NOT BE BASED ON THE EXISTENCE OF A SUBSCRIBER.....	8
V. CONCLUSION	10

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Pursuant to the Commission's First Report And Order And Further Notice Of Proposed Rulemaking in WT Docket No. 99-217 ("First Report And Order"), Adelphia Business Solutions, Inc. ("ABS") submits these Reply Comments concerning access by competitive local exchange carriers ("CLECs") to subscribers, buildings and wiring in multiple tenant environments ("MTEs").

I. INTRODUCTION

Over a year and a half have passed since ABS submitted its comments in response to the

Commission's *Competitive Networks NPRM*.¹ Yet, little has happened during that time to improve ABS' ability to access buildings and wiring, and serve subscribers, in MTEs. While the Commission's rules issued in the First Report And Order were an important step, more needs to be done.

In response to the First Report And Order, the Commission has received many comments and a detailed record. ABS will not restate the legal discussions of parties with whom it generally agrees, such as AT&T Corp. Rather, in these Reply Comments, ABS expresses its support for broad nondiscriminatory access to buildings and wiring,² addresses some of the flaws in the position of real estate interests, such as the so-called Real Access Alliance ("RAA"), and provides the Commission with important legal precedent regarding the scope of utility easements within buildings.

¹ Promotion of Competitive Networks in Local Telecommunications Markets, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd. 12673 (1999).

² ABS' discussion in these Reply Comments is limited to commercial MTEs. ABS does not take a position regarding purely residential MTEs, at this time. However, ABS strongly believes that the Commission should not exclude from its rules buildings that are mixed commercial and residential, regardless of the predominant use. There are many buildings, particularly in major metropolitan areas, such as Washington, D.C., where building owners are now required by law to construct substantial residential space in order to have ground floor commercial space. The goals of the Commission's rules will be frustrated if such mixed use buildings, which may collectively contain a significant portion of an area's commercial customers, are excluded merely because they contain some or even predominantly residential space.

In addition, ABS believes that the Commission should not exclude government buildings from the application of its non-discrimination rules. While some government buildings have a complete unity of identity between a government agency as landlord and the government agency as the building's sole consumer of telecommunications services, many government buildings and campuses contain multiple government agencies and offices, each of which procures its telecommunications services separately. In such circumstances, all LECs should have the opportunity to compete for the business of each of those separate governmental "tenants", rather than allowing a single LEC to lock up the business customers through a single contract with the government in its role as building owner.

II. ABS SUPPORTS A COMMISSION RULE BANNING ILECS FROM SERVING MTEs THAT DO NOT PERMIT NONDISCRIMINATORY ACCESS TO ALL LECs

In the First Report And Order, the Commission suggests that it plans to observe the actions of building owners first, and then, only if its “concerns regarding the ability of premises owners to discriminate unreasonably among competing telecommunications service providers are not adequately resolved without regulatory intervention . . .”, will it “consider adopting a nondiscriminatory access rule, in the form either of a direct regulation of property owners or of a regulation of common carrier practices.”³ The message from the comments filed by CLECs, however, is that the Commission should act now by adopting a rule that prohibits ILECs from serving MTEs that do not provide nondiscriminatory access to all LECs.⁴ ABS supports that position.

Experience has demonstrated that building owners have little or no incentive to voluntarily accommodate multiple LECs on nondiscriminatory terms and conditions. Despite their rhetoric about how their concern for providing tenants with the best possible telecommunications service will drive them to provide nondiscriminatory access, building owners’ true incentives do not lie with the best interests of their tenants or with the development of telecommunications competition.⁵ Indeed, if building owners are driven by the interests of their tenants, then why do they force a CLEC to pay a percentage of its revenues or exorbitant up-front and recurring fees in return for access to the building? And why do they want ownership of a CLEC’s facilities at the end of an agreement? And why do they use delay as

³ First Report And Order at ¶ 151.

⁴ See, e.g., Comments of AT&T Corp. at 6.

leverage in negotiations? The reality of course is that their own pecuniary interests, building owners are driven by their own pecuniary interests, and they pursue those interests without fear of adverse ramifications. As the Commission recognized, the costs and difficulties of relocating a business make it unrealistic for commercial tenants to “use their feet” if they are unhappy with the unavailability of telecommunications competition within the building.⁶ So while building *managers* may hear complaints about competition, building *owners* have no inherent reason to provide nondiscriminatory access to multiple telecommunications providers.

In light of those realities, the Commission should not wait for voluntary actions by the real estate industry. The Model Agreement and “Best Practices” in development by RAA, while perhaps a commendable start, are inadequate on several levels. First, they are non-binding guidelines, at best. No building owner is required to follow them. Second, the RAA does not represent the entire real estate industry. Thus, even if every RAA member were bound to the standards, a substantial majority of buildings would still not be subject to them.

Third, the “Best Practices” and Model Agreement are open-ended and vest too much discretion in the building owner as to their application. For example, RAA’s Further Comments state that “*Where appropriate*, the members of the Alliance are committed to incorporating the practices summarized below. . . .”⁷ Thus, whenever a RAA member decides that the circumstances are not “appropriate” (*e.g.*, where it does not like a particular provider, or where the provider refuses to acquiesce to kickback demands), the member can simply ignore the “Best Practices.” The Model Agreement is no better. For example, the draft Model Agreement

⁵ Indeed, building owners previously sought to justify exclusive access contracts as being necessary to ensure the best telecommunications services for their tenants.

⁶ First Report And Order at ¶ 31.

attached to RAA's Further Comments contains numerous critical substantive provisions, such as the rate and notice timing provisions, that are left open for the owner's discretion.⁸

Finally, the general posture of the Model Agreement and proposed guidelines demonstrates why they cannot alleviate the need for Commission action.⁹ While a model agreement and Best Practices guidelines could be useful, if they contained appropriate, bilateral terms and were reached on a consensus basis by representatives of both industries,¹⁰ the RAA's Model Agreement and proposed guidelines are **unilaterally** created documents designed to be forced onto providers. For example, the proposed guidelines call for owners to respond within 30 days, but only if the provider agrees to accept the Model Agreement.¹¹ In other words, the RAA guidelines provide owners a license to use speed as leverage for the imposition of one-sided terms.

ABS is particularly concerned that the guidelines and Model Agreement are inappropriately providing owners with a cloak of legitimacy for otherwise discriminatory practices. The Commission should not be fooled into thinking that the self-serving actions of some building owners will have any meaningful impact on the general discriminatory treatment of competitive telecommunications providers in commercial MTEs. The Commission should act

⁷ RAA Further Comments at 26 (emphasis added).

⁸ RAA Further Comments at Exhibit G. ABS notes that the Model Agreement attached to RAA's Further Comments appears to be missing the exhibit that would contain definitions of key terms, such as "Communications Spaces and Pathways."

⁹ ABS' discussion is not intended to be a comprehensive analysis of the RAA guidelines and Model Agreement. ABS generally agrees with the analysis of the problems in the RAA guidelines and agreement set forth in comments by AT&T Corp.

¹⁰ Even such industry consensus would be difficult to reach, as the interests of competitive telecom providers differ substantially based on their business model.

¹¹ RAA Further Comments at 27.

now to encourage competition by enacting rules that prohibit incumbent LECs from serving buildings that do not provide nondiscriminatory access to all LECs.

III. EASEMENT LAW PROHIBITS THE UNDERLYING PROPERTY OWNER FROM RESTRICTING APPORTIONMENT OF UTILITY EASEMENTS

While ABS generally agrees with the comments of the Smart Building Policy Project regarding the Commission's inquiry into the scope of Section 224 in the MTE context, there is an important point of easement law that appears to have been overlooked or ignored by most of the commenters. ABS brings this point to the Commission's attention, as it may allow the Commission to avoid creating a division between its rules and the long-standing doctrines of property law.

Building owner commenters have argued that new providers cannot use the existing easements of utility companies within buildings without permission from, and payment to, the building owner.¹² That argument, however, is inconsistent with well-established principles of property law.

Easements granted to utility companies are commercial easements in gross. It is virtually universally agreed that commercial easements in gross are freely "apportionable," that is, the owner of the easement may allow others to use the easement for compatible purposes. So long as no additional burden is created, such apportionment does not require permission from, or additional payment to, the underlying property owner. The rationale for this rule is that the underlying property owner was fully compensated for use of the space at the time the initial easement was granted. Applying these principles, numerous courts,¹³ and the Restatement,¹⁴

¹² See, e.g., Comments of Community Associations Institute at 3.

¹³ See, e.g., *Hise v. Barc Electric Coop.*, 492 S.E.2d 154 (Va. 1997); *Laubshire v. Masada Cable Partners II*, No. 95-CP-04-988 (S.C. Cir. Ct. Common Pleas Apr. 24, 1996); *C/R TV Inc. v.*

have held, for example, that easements granted to electric and telephone companies may be used by cable television operators, without permission from or payment to the owner of the underlying property. The cases have recognized that the addition of one more wire, a wire that the easement holder itself could have installed, creates no additional burden on the underlying property owner.¹⁵

Many building owner commenters have overlooked these well-established principles.¹⁶ The Commission, however, should be mindful not to create any inconsistency between its rules regarding the power of building owners to exclude providers and the common law of easements, which authorizes providers to use existing easements regardless of the building owner's objections.

Shannondale Inc., 27 F.3d 104 (4th Cir. 1994); *Centel Cable Television Co. v. Cook*, 567 N.E.2d 1010, 1015 (Ohio 1991); *Wittman v. Jack Barry Cable TV*, 228 Cal. Rptr. 584, 586 (Cal. Ct. App. 1986); *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798 Cal. App. 1985); *Henley v. Continental Cablevision Co.*, 692 S.W.2d 825 (Mo. Ct. App. 1985); *Hoffman v. Capitol Cablevision Systems, Inc.*, 383 N.Y.S.2d 674 (App. Div. 1976); *Joliff v. Hardin Cable Television Co.*, 269 N.E.2d 588 (Ohio 1971).

¹⁴ The first Restatement stated that commercial easements in gross, such as utility easements, are freely apportionable for use by other entities, so long as the use is consistent with the originally intended use. Restatement of Property § 493 (1944). The recently adopted Restatement, Third, of Property, also states that easements in gross can be "divided" by the easement holder for use by multiple parties. Restatement, Third, Property § 5.9. In support of § 5.9, the Third Restatement cites many of the cable television cases cited above, including *Wittman*, *Salvaty*, *Henley*, *Hoffman*, *Centel Cable*, and *Joliff*. Restatement, Third, Property § 5.9, Reporter's Note.

¹⁵ See, e.g., *See Clark v. El Paso Cablevision*, 475 S.W.2d 575 (Tex. Civ. App. El Paso 1971). Of course, this assumes that the new wire fits within the existing easement space.

¹⁶ See, e.g., Comments of Community Associations Institute at 3. Contrary to the Community Associations Institute's unsupported assertion, allowing a new provider to place wires in an existing utility easement does not "modify" the scope of the easement. See supra note 13. The Institute's statements regarding "Black Letter Law" and unconstitutional takings have no citation of authority in support because they are contrary to the actual law, and should be disregarded.

IV. PREFERENTIAL MARKETING AGREEMENTS SHOULD BE PROHIBITED, THE COMMISSION'S RULES SHOULD APPLY TO EXISTING AGREEMENTS, AND ENFORCEMENT SHOULD NOT BE BASED ON THE EXISTENCE OF A SUBSCRIBER

A key issue for some ILECs and building owners concerns so-called "preferential marketing agreements." Proponents of such agreements couch their support in claims that they are really procompetitive and in the best interests of tenants. ABS disagrees with those arguments, however, and agrees with the comments of AT&T in opposing such agreements.¹⁷

The phrase "preferential marketing agreements" is little more than a politically correct code word for exclusive agreements. Under preferential marketing agreements, building owners, while not legally bound to exclude all others, have a substantial practical incentive to discriminate against all other telecommunications providers to the greatest extent possible. It is simple logic to realize that if a building owner has a pecuniary interest in the revenues generated by a particular provider, it will have a powerful incentive to make access and operations difficult and expensive for all other providers. Ultimately, such situations are equally as anti-competitive as exclusive agreements. Indeed, in some respects they are worse. Under the guise of nondiscriminatory access, the property owner will likely require CLECs to pay a fee for access to the building, only then to discriminate against them at a fundamental operational level.

ABS also agrees with those parties that support the enforcement of the Commission's rules against existing exclusive and preferential marketing agreements. As AT&T and SBC note, permitting the enforcement of existing exclusive and preferential marketing agreements will deprive CLECs of access to an important segment of every market, and thereby will place CLECs at a significant economic disadvantage in attaining a sustainable level of business in

¹⁷ Comments of AT&T at 43-46.

competition with entrenched, incumbent LECs. In short, grandfathering of existing exclusive and preferential marketing agreements will not advance the companion goals of allowing CLEC entry into multi-tenant buildings and developing competition among telecommunications carriers for the benefit of tenants.¹⁸

Finally, ABS agrees with AT&T regarding enforcement of the Commission's rules. Specifically, Alternative Dispute Resolution ("ADR") should not be required, as it would impose unacceptable delay. The Commission should use its expedited procedures to ensure that regulatory delay does not exacerbate the damage caused by the building owner's action.¹⁹ In addition, ABS believes that it is critical that enforcement of the Commission's rules not depend on whether a CLEC has obtained, or even received a request from, a potential subscriber.²⁰ Once a CLEC has a potential customer, the delay of then negotiating and perhaps adjudicating access would destroy the relationship with the subscriber. Indeed, many CLECs will not even market potential customers in a building until they are in a position to immediately provide service (*i.e.*, until after they have accessed the building). One of the primary complaints of customers is the inability of CLECs to promptly provide the service promised. Forcing a CLEC to wait until after it has a subscriber in a building would thwart the goal of introducing real competition into multi-tenant environments.

¹⁸ Comments of AT&T at 41; Comments of SBC Communications, Inc. at 4.

¹⁹ AT&T Comments at 37-39.

²⁰ AT&T Comments at 36-37.

V. CONCLUSION

For the foregoing reasons, the Commission (1) should prohibit ILECs from serving any commercial, mixed-use or governmental buildings that do not afford all providers nondiscriminatory access, (2) should not adopt a limited interpretation of Section 224; (3) should prohibit preferential marketing agreements; (4) should extend its rules to prohibit the enforcement of existing exclusive and preferential marketing agreements; and (5) should adopt expedited procedures for hearing complaints involving allegations of denial of non-discriminatory access to MTEs.

Respectfully submitted,



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February 21, 2001

CERTIFICATE OF SERVICE

I, Glendora Williams, hereby certify that I have this 21st day of February, 2001, caused a copy of the foregoing Reply Comments of Adelphia Business Solutions, Inc., to be delivered by courier to the following:

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